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No. 87-689

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

UNITED TRANSPORTATION UNION,
Petitioner,
v.
NORFOLK & WESTERN RAILWAY COMPANY,
SOUTHERN RAILWAY COMPANY and
INTERSTATE RAILROAD COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

On November 25, 1987, respondents Norfolk & Western Railway Company, Southern Railway Company and Interstate Railroad Company [hereinafter, "N&W," "Southern" and "Interstate," respectively] served a brief in opposition to the petition by the United Transportation Union [hereinafter, "UTU"] for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. By its petition, the UTU is asking this Court to review the decision of the court of appeals in *UTU v. N&W*, 822 F.2d 1114 (D.C. Cir. 1987), in which the appellate court concluded that the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"], and not the district courts, has jurisdiction to determine whether an ICC rail-exemption order under 49 U.S.C. § 10505 relieves a railroad of its obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Petitioner UTU submits that respondents' brief in opposition raises certain arguments and makes

certain statements to which a response should be made; therefore, this reply brief is respectfully submitted in response to the railroads' brief.

I. Respondents' Arguments, Contrary To Their Assertions, Show That This Case Presents Important Issues Of Statutory Construction Which Were Before This Court In *ICC v. BLE*, 482 U.S. ——, 96 L.Ed.2d 222 (1987), But Which Are Still In Dispute

In its petition, the UTU asserted that this case presents a recurring jurisdictional question, the resolution of which is important to the orderly administration of both the Railway Labor Act and the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.* Pet. at 7. Respondents, as may be expected, disagree and assert further that, in their opinion, "this case presents no occasion for any interpretation of the provisions of the Interstate Commerce Act." Resp. Brief at 13. However, respondents support their position by contending, as if the accuracy of their contentions were a matter of accepted dogma, that ICC orders supersede the Railway Labor Act and that the Interstate Commerce Act has for decades provided for the compulsory arbitration of major disputes which arise out of the implementation of financial transactions approved by the ICC. Resp. Brief at 14-15. Moreover, when the bare surface of respondents' arguments is scratched, it becomes clear that respondents' argument that the UTU's suit to enforce the Railway Labor Act is nothing more than a collateral attack on an ICC order, is implicitly premised on two critical assumptions. First, respondents assume that Congress has in fact given the ICC the power to override the Railway Labor Act, and second, they assume that Congress has further given that agency jurisdiction to determine whether such a supremacy is necessary in a particular case. What respondents obfuscate, however, is that the validity of those assumptions is at issue in this case and presents questions which are crucial to the entire rail industry today.

As the briefs in connection with the petition by the ICC for a writ of certiorari in *ICC v. BLE*, 482 U.S. ——, 96 L. Ed.2d 222 (1987) (Sup. Ct. No. 85-792) show, the assumptions upon which respondents rely so heavily were very much in dispute in 1985 and, according to the National Railway Labor Conference,[1] presented the most "important labor relations issue in the railroad industry" at that time. Brief for NRLC in support of Petition in Sup. Ct. Nos. 85-792 and 85-793 at 2, served December 6, 1985. This Court granted the writ in the *ICC v. BLE* case, but unfortunately, because the *ICC v. BLE* case was decided on a jurisdictional basis which did not touch upon the merits of the question for which the writ of certiorari was granted, this Court did not resolve the crucial dispute between rail labor and the railroads over the impact of ICC orders on employee rights under the Railway Labor Act. Nevertheless, respondents act as if this dispute never existed, or if it existed, was of recent invention by rail labor.

A. This Case Does Not Present A Straightforward Or Correct Application Of The Collateral Attack Doctrine

Respondents' main justification for opposing the writ in this case is that, in their opinion, the court of appeals' decision "represents the straightforward and correct application of a familiar principle of administrative law prohibiting collateral attacks on administrative agency orders, and presents no important issues for review in this Court." Resp. Brief at 7-8. However, respondents' collateral attack argument rests upon their assumption that the ICC has the power to decide the central issue presented by the UTU's suit—*i.e.*, whether the ICC exemption order overrides the Railway Labor Act—since, before a district court suit can be considered as being a collateral attack on an agency order which is

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[1] The National Railway Labor Conference is the bargaining arm for most of our nation's railroads, including respondents, on many collective bargaining subjects such as rates of pay, some rules, and many fringe benefits.

reviewable in another judicial forum, the agency has to have jurisdiction to consider the issues presented in the district court suit. *Compare, Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 419 (1965), *with, United States v. Citizens And Southern National Bank*, 422 U.S. 86, 102-03 (1975).

What respondents fail to recognize in confidently concluding that this case involves a collateral attack on an ICC order, is that the disputed issue in this case is not whether the ICC or the courts of appeals have exclusive jurisdiction to review the arbitrator's interpretation of the ICC's employee protective conditions, but rather, whether the ICC (or even an arbitrator acting under that order) has jurisdiction to make the determination as to the effect of its order on other laws.[2] If the Commission does not have jurisdiction to determine whether its orders override other laws, the district Court suit cannot be viewed as being a collateral attack. *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 122-23 (1948). On the other hand, if the ICC does have the power to determine if its orders supersede Railway Labor Act rights, this case may then present a collateral attack. In other words, respondents and the court of appeals have decided the collateral attack question by assuming without any discussion that the ICC has jurisdiction to determine the impact of its orders on the non-Interstate Commerce Act statutory rights of rail employees. How-

[2] In this case, respondents relied upon the ICC's employee protective provisions to submit to an arbitrator the unresolved question of whether, as respondents proposed, the UTU-Interstate trainmen should be transferred over their objections to the UTU-N&W rules agreement. This dispute is a "major dispute" under the Railway Labor Act (*e.g., Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-23 (1945)), and may not be resolved by an arbitrator unless both labor and management agree to arbitrate. 45 U.S.C. § 157 First. Thus, the crucial question posed by the UTU's complaint is whether the ICC's exemption order overrode Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, and not whether the arbitrator properly balanced the equities in discharging his duties under the ICC's employee protective provisions.

ever, it is the validity of the court of appeals' and respondents' implicit assumption that the ICC has jurisdiction to determine this conflict of laws issue which presents the crucial and disputed question for review in this case.

The appellate court's assumption that the ICC has jurisdiction to decide the conflict of laws question is entirely consistent with that court's earlier decision in *ICC v. BLE, supra.* In that case, the court of appeals concluded that the immunity granted by 49 U.S.C. § 11341(a) is *not* self-executing and that the ICC "must supply a reasoned basis for that exercise of its statutory authority." *BLE v. ICC*, 761 F.2d 714, 723 (D.C. Cir. 1985) (footnote omitted), *vacated, ICC v. BLE, supra.* That view of the ICC's, and *a fortiori* its arbitrator's, authority is relevant here for Section 11341(a) is an explicit expression of an intent to override other laws which respondents have argued is either applicable or implicit in this case. But, as the four concurring Justices showed in *ICC v. BLE, supra*, 96 L. Ed.2d at 246 (Stevens, J., concurring), such a view of the Interstate Commerce Act is "based on a misunderstanding of § 11341" and, petitioner submits, the ICC's authority over conflicting laws.

This Court has previously held that the ICC does not have the authority to construe or to enforce other laws which may touch upon transactions approved under the Interstate Commerce Act. *Schwabacher v. United States*, 334 U.S. 182, 190 (1948); *McLean Trucking Co. v. United States*, 321 U.S. 67, 79-88 (1944). As this Court observed in *McLean Trucking*:

> The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action.

321 U.S. at 79-80. Since the ICC does not have the authority to enforce non-Interstate Commerce Act laws, such as the Railway Labor Act, it logically follows that the tribunal which is called upon to enforce the other law, and not the ICC, is the proper forum to determine whether the other law survives an ICC order. *ICC v. BLE*, *supra*, 96 L. Ed.2d at 247n.13 (Stevens, J., concurring). Consequently, a suit to enforce the other law is not a collateral attack on the ICC's order.

This conclusion flows from this Court's decision in *Seaboard Air Line R.R. v. Daniel*, *supra*, where the Court raised *sua sponte* the question of whether a state court, as contrasted with the federal courts which had the exclusive jurisdiction to review an ICC decision, had jurisdiction to consider both a suit to enjoin a state from enforcing a law from which the railroad claimed it was immunized by an ICC consolidation order, and an answer which "questioned the validity and scope of that [ICC] order . . . ." 333 U.S. at 122. According to this Court, the state court had jurisdiction:

> So far as the [railroad's] . . . complaint is concerned, this is not the kind of action to "set aside" a Commission order of which the federal district courts [and now, the courts of appeals] have exclusive jurisdiction. While the action does involve the scope and validity of a Commission order, the relief requested in the complaint was the removal of an obstruction to the railroad's obedience to the order, not its suspension or annulment. Nor did the answer seek to have the enforcement of the order enjoined, although it did question its validity as a basis for the relief sought in the complaint.

333 U.S. at 122-23. This Court then addressed the scope of the state court's authority over the ICC's order and stated (*Id.* at 123):

> [T]he state court . . . had power, because of the issues raised by the complaint and because of the relief requested, to determine whether the [ICC] order, properly interpreted, did exempt [the rail-

> road] . . . from compliance with the state railroad corporation laws and, if so, whether the Commission had transcended its statutory authority in making the order.

Respondents and the court of appeals viewed petitioner UTU's complaint very narrowly as being a suit to set aside the arbitrator's award which they assert is "functionally" the same as an order of the ICC, thereby, in their opinion, making this case a classic collateral attack situation. Even if the UTU's suit could be construed so narrowly and not as a suit to enforce Section 7 First of the labor statute, petitioner UTU respectfully submits that the very notion that an arbitrator can be viewed as being functionally equivalent to the ICC and may conclude that he and the ICC have been given the authority to override the Railway Labor Act by compelling a union to arbitrate a major dispute, clearly shows that at the very least this case does not present a "straightforward" application of a familiar principle of administrative law prohibiting collateral attacks on agency orders.

B. Respondents Have Glossed Over The Need For An Expeditious Resolution Of The Underlying Dispute Between Rail Labor And The Railroads Over The Relationship Between The Railway Labor Act And The Interstate Commerce Act

After confidently asserting that this case does not present an occasion to interpret any provision of the Interstate Commerce Act (Resp. Brief at 13), respondents go on to state that the ICC's employee protective provisions give an arbitrator under those conditions the power both to arbitrate "major disputes" (notwithstanding the clear command of Section 7 First of the Railway Labor Act, 45 U.S.C. § 157 First, and a congressional policy of almost one hundred years against compulsory arbitration of such disputes) and to abrogate existing collective bargaining agreements. According to respondents, "[m]andatory arbitration of labor disputes arising under protective conditions has been an integral requirement of the conditions for decades." Resp. Brief at 15. The va-

lidity of that assertion, which petitioner has consistently challenged since it was first raised in the early 1980's in so far as it pertains to "major disputes" under the labor statute (*see*, Brief for UTU in Sup. Ct. Nos. 85-792 and 85-793 at 33-50), clearly presents an important issue of statutory construction, because rail labor maintains that since the 1976 Amendment to what it is now, 49 U.S.C. § 11347, no ICC order may override the Railway Labor Act. *See*, Pet. at 13-14n.9. In view of respondents' assumptions that the ICC's authority over rail financial transactions overrides the Railway Labor Act, the relationship between the two Acts and the issue of whether the transportation law authorizes the compulsory arbitration of major disputes, is in fact presented by this case as a necessary issue under the Question Presented for Review.

As petitioner explained in its petition (Pet. 19-21), rail labor and the railroads must know as expeditiously as possible whether the Interstate Commerce Act can override the Railway Labor Act. This issue is at the heart of the disputes which have erupted frequently since late 1983 when the ICC, in the orders at issue in *ICC v. BLE*, *supra*, declared for the first time in the history of the Interstate Commerce Act that its orders did in fact override the Railway Labor Act in a particular case. *See*, *Southern Ry.—Control*, 331 I.C.C. 151, 169-71 (1967); *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 701-02 (1958).[3] In the four

[3] Although the ICC stated in those cases that if there were a conflict between the two laws, its orders would prevail, the ICC did not conclude that the Railway Labor Act posed a conflict in those cases. In two appellate court decisions which addressed the relationship between the two Acts, the courts opined that the Interstate Commerce Act superseded the labor statute, but in both cases the courts enforced *agreements* and not ICC devised conditions; this distinction is important because Sections 7 to 9 of the Railway Labor Act authorize agreements to arbitrate major disputes, and thus, an ICC order adopting such an agreement does not conflict with the labor statute. *Burlington Northern, Inc. v.*

years since those 1983 ICC orders, as amplified by the Commission's *dicta* in Finance Docket No. 30532, *Maine Central R.R.—Exemption*, served September 13, 1985, *aff'd sub nom., RLEA v. ICC*, 812 F.2d 1443 (D.C. Cir. 1987) (table), the railroads have maintained that ICC orders relieve them of their Railway Labor Act obligations, and that any suit by rail labor to enforce that labor statute is a collateral attack on the ICC orders, whether or not employee protective provisions are imposed. *E.g., RLEA v. Guilford Transportation Industries, Inc.*, 667 F.Supp. 29 (D. Me. 1987), *appeal pending*, 1st Cir. No. 87-1774.

This consistent refusal by the railroads to comply with the Railway Labor Act in situations involving ICC orders has led to at least seven suits in the past seven months and to three strikes and the threat of one more in the past four months. *E.g., RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987). At present, six courts of appeals have cases before them which raise issues arising from the carriers refusal to comply with the Railway Labor Act,[4] but it is very un-

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ARSA, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975); *BLE v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963).

[4] The courts of appeals and the cases pending in those courts are as follows:

First Circuit:

RLEA v. Guilford Transportation Industries, Inc., 1st Cir. 87-1774 (to be argued Jan. 8, 1988);

Third Circuit:

RLEA v. Pittsburgh & Lake Erie R.R., 3rd Cir. No. 87-3797 (to be argued Jan. 6, 1988);

Fifth Circuit:

RLEA v. City of Galveston, Texas, et al., 5th Cir. No. 87-6169;

Eighth Circuit:

RLEA v. Chicago & North Western Transportation Co., 8th Cir. No. 87-5071MN (argued December 18, 1987);

likely that any decision in those cases can be presented to this Court for argument this term. Thus, the dispute over the relationship between the two Acts will continue to plague the rail industry until at least late 1988 or early 1989, if the writ is not granted in this case. Unfortunately, because the railroads in the interim will continue to look to labor as a means to reduce their costs and will continue to use the ICC's authority as an authorization to cut their labor costs, rail labor will have only one defense to such unfair cost cutting measures—the strike—if they are denied access to the courts to enforce the Railway Labor Act. Since this case squarely presents the issue of whether rail labor has access to the courts to enforce the labor statute which Congress enacted to eliminate the need for strikes—*i.e.*, the Railway Labor Act—this case, contrary to respondents' belief, presents important questions which desperately need to be resolved.

CONCLUSION

For the reasons set forth in its petition and herein, the UTU submits that the writ should be issued.

Respectfully submitted,

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Burlington Northern R.R. v. UTU, 8th Cir. Nos. 87-2600 and 87-2581 (briefs due December 29, 1987);

Ninth Circuit:

UTU v. Burlington Northern R.R., 9th Cir. No. 87-4386;

Eleventh Circuit:

BRAC v. CSX Transportation, Inc., 11th Cir. No. 87-8446.